Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Services Inside Wiring Customer Premises Equipment	)	CS Docket No. 95-184
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring	)	MM Docket No. 92-260
	)	
Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloop	)	WC Docket No. 01-338

REPORT AND ORDER AND DECLARATORY RULING

Adopted: May 31, 2007 **Released: June 8, 2007**

By the Commission: Chairman Martin and Commissioners Copps, Adelstein and McDowell issuing separate statements.

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I. INTRODUCTION

1. In this *Order*, we take steps to eliminate barriers to competitive entry in multiple dwelling units (MDUs) and in multiunit premises, when a new entrant seeks to compete against an incumbent provider. Part I of this *Order*, responds to a decision issued by the United States Court of Appeals for the District of Columbia Circuit regarding amendment of the Commission's cable television inside wiring

rules.[1] In the 2003 order reviewed by the court, the Commission had modified its rules to provide that "home run wiring" located behind sheet rock is considered physically inaccessible for purposes of determining the demarcation point between home wiring and home run wiring.[2] The Commission then concluded that cutting and repairing sheet rock adds significantly to the physical difficulty and cost of wiring an MDU. In this *Order*, we conclude that cable wiring located behind sheet rock qualifies as physically inaccessible under the Commission's rules for purposes of determining the demarcation point between home wiring and home run wiring. The record shows that accessing such wiring causes significant damage or modification to a preexisting structural element and generally adds significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring. This ruling will facilitate competition in video distribution markets by clarifying the circumstances under which the existing cable home run wiring in MDUs can be made available to alternative video service providers.

2. In Part II of this *Order*, we grant, as described below, a petition for declaratory ruling filed by Cox Oklahoma Telcom, L.L.C. (Cox) regarding the scope of requesting carriers' right to access incumbent local exchange carriers' (LECs') inside wire subloops in multiunit premises. Specifically, Cox asks the Commission to clarify that incumbent LECs must allow requesting carriers to have direct access to the inside wire subloop in multi-tenant environments (MTEs) for the purposes of performing installations.[3] As explained below, we grant Cox's petition and conclude that state commission decisions denying requesting carriers direct physical access to incumbent LECs' inside wire subloops in multiunit premises pursuant to section 251(c)(3) of the Communications Act of 1934, as amended (the Act) are inconsistent with the Act and Commission precedent and would frustrate the development of competition.

3. The *Order* that we adopt today takes important steps to ensure that the pro-competitive, deregulatory goals of the 1996 Act are realized. Our actions here remove both economic and operational barriers to infrastructure investment in the communications market. New entrants to the video services and telephony markets should not be foreclosed from competing for consumers in multi-unit buildings based on regulatory technicalities or costly and inefficient industry practices. By removing these obstacles, we further the opportunities for consumers living in multi-unit buildings to enjoy the social and economic benefits of communication services competition.

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[1] *National Cable & Telecommunications Association v. Federal Communications Commission and United States of America*, No. 03-1140, 2004 WL 335201 (D.C. Cir. Feb. 17, 2004, unpublished) (*Appeals Court decision*).

[2] *Telecommunications Services Inside Wiring, Customer Premises Equipment and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, CS Docket No. 95-184, MM Docket No. 92-260, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342 (2003) (*Reconsideration Order*). Cable home run wiring in a MDU is the wiring that runs from the demarcation point to the point at which the multichannel video programming distributor's (MVPD) wiring becomes devoted to an individual subscriber or individual loop. *See* 47 C.F.R. § 76.800(d). In contrast, "cable home wiring" is the internal wiring contained within the premises of a subscriber, which begins at the demarcation point and runs to the subscriber's television set or other customer premises equipment. *See* 47 C.F.R. § 76.5 (ll).

[3] Cox's Petition for a Declaratory Ruling for Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carrier's Inside Wire Subloop, WC Docket No. 01-338 (filed Oct. 27, 2004) (Petition) at 1; *see also* 47 U.S.C. § 251; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act). The Petition was placed on public notice on November 4, 2004 with comments due by December 6, 2004, and reply comments due by December 21, 2004. *Pleading Cycle Established for Comments On Cox's Petition for a Declaratory Ruling, for Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carrier's Inside Wire Subloop*, WC Docket No. 01-338, Public Notice, 19 FCC Rcd 22040 (WCB 2004). See Appendix A for a list of commenters filed in WC Docket No. 01-338.

II. BACKGROUND

A. Cable Inside Wiring Rules

4. In 1993, the Commission first promulgated rules for cable home wiring and for the disposition of that wiring after termination of service.[4] In 1996, the Commission addressed certain cable home wiring issues and sought comment regarding how the Commission should revise these rules to reflect new developments, and how to promote competition by ensuring that the Commission's rules would facilitate the use of new and diverse services.[5] In 1997, the Commission sought further comment on and addressed issues regarding procedures for the disposition of home run wiring in MDUs[6] when an MDU owner decides to terminate service for the entire building and when an MDU owner is willing to permit two or more video service providers to compete for subscribers in the MDU on a unit-by-unit basis.[7] In 2003, the Commission resolved the issues presented on reconsideration in that proceeding.[8]

5. Central to any discussion on cable home wiring or cable home run wiring is the matter of the MDU demarcation point, which is the point at which a consumer's home wiring becomes the network's home run wiring. The Commission has previously stated that the cable wiring demarcation point serves such multiple purposes as defining (1) the location at which the subscriber may control the internal home wiring if he or she owns it; (2) the point at which an alternative multichannel video programming distributor (MVPD) would attach its wiring to the subscriber's wiring in order to provide service; and (3) the point from which the customer has the right to purchase cable home wiring upon termination of service.[9] For purposes of this proceeding, a critical component of our discussion involves the location of the demarcation point because it is where a competing provider may access existing cable home wiring in an MDU building. The demarcation point for MDUs is set at (or about) twelve inches outside of where the cable wire enters the subscriber's individual dwelling unit.[10] In the event that the cable demarcation point is "physically inaccessible" to an alternative MVPD, the demarcation point moves away from the individual dwelling unit to a point at which it first becomes physically accessible.[11] The Commission has concluded that, for the cable demarcation point to be "physically inaccessible," access to the wiring must

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[4] *See* Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), Pub. L. No. 102-385, 106 Stat. 1460 (1992), 47 U.S.C. § 521, *et seq.*; *see also* 47 U.S.C. § 544(i); 47 C.F.R. §§ 76.5(ll), (mm) and 76.801, 76.802; *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring*, MM Docket No. 92-260, Report and Order, 8 FCC Rcd 1435 (1993) (*Cable Wiring Order*).

[5] *Telecommunications Services Inside Wiring and Customer Premises Equipment*, Notice of Proposed Rulemaking, 11 FCC Rcd 2747 (1996) (*Inside Wiring Notice*); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, MM Docket No. 92-260, First Order on Reconsideration and Further Notice of Proposed Rulemaking, 11 FCC Rcd 4561 (1996) (*First Reconsideration Order and Further Notice*).

[6] An MDU is a building or buildings with two or more residences, such as an apartment building, condominium building, or cooperative. *See* 47 C.F.R. § 76.800.

[7] *Telecommunications Services Inside Wiring, Customer Premises Equipment and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 (1997) (*Report and Order and Second Further Notice*).

[8] *See Reconsideration Order*, 18 FCC Rcd at 1342 (2003).

[9] *Inside Wiring Notice*, 11 FCC Rcd at 2750.

[10] 47 C.F.R. § 76.5(mm)(2). The demarcation point for single unit installations is the same. *See* 47 C.F.R. § 76.5(mm)(1). The presumptive demarcation point was adopted in the *Cable Wiring Order*, 8 FCC Rcd 1435 (1993).

[11] *Id.*; *see also Report and Order and Second Further Notice*, 13 FCC Rcd at 3729.

(1) require significant modification or damage to preexisting structural elements, and (2) add significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring.[12]

6. The *Appeals Court decision* remanded that portion of the *Reconsideration Order* that amended the Note to Section 76.5(mm)(4) of the Commission's rules to indicate that wiring embedded in sheet rock would be considered physically inaccessible.[13] Previously, the Commission provided examples of wiring that would be considered "physically inaccessible," including wiring embedded in brick, metal conduit, and cinder blocks with limited or no access openings.[14] Wiring simply enclosed within hallway molding would not be considered inaccessible.[15] The Court found that the Commission offered no reasoned basis for expanding the Note to include sheet rock and remanded the case to the Commission for further consideration.[16] In response, the Commission sought comment on its conclusions in the *Reconsideration Order* with regard to Section 76.5(mm)(4) of the rules and the amendment of the applicable Note.[17]

B. Incumbent LEC Inside Wire Subloops

1. Cox's Petition

7. Cox filed its petition in response to a decision by the Oklahoma Corporation Commission (OCC) arbitrating a dispute over access to the inside wire subloop between Cox, a competitive LEC, and the incumbent LEC, Southwestern Bell Telephone Company (SBC).[18] Cox seeks a Commission declaration confirming that: (1) requesting carriers have a right to direct physical access to incumbent LECs' inside wire subloops in MTEs; (2) this right allows requesting carriers to obtain direct access to inside wire subloops at incumbent LECs' terminal blocks in MTEs; and (3) this right exists regardless of any state law or regulation that would otherwise limit it.[19] Cox asserts that the OCC arbitration decision denied it those rights.

8. Cox argues that the right of requesting carriers to access incumbent LECs' inside wire subloops is supported by the Commission's decision in the *Triennial Review Order,* as well as by the underlying principles of the Act and federal policy encouraging local competition for customers in

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[12] 47 C.F.R. § 76.5(mm)(4); *see also Report and Order and Second Further Notice*, 13 FCC Rcd at 3730.

[13] *See Appeals Court decision* at 1; Note to 47 C.F.R. § 76.5(mm)(4) (2003).

[14] *Report and Order and Second Further Notice at 3730; Note to 47 C.F.R. § 76.5(mm)(4) (2002).*

[15] *Id.*

[16] *See Appeals Court decision* at 3.

[17] *See Telecommunications Services Inside Wiring, Customer Premises Equipment and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, CS Docket No. 95-184, MM Docket No. 92-260, Further Notice of Proposed Rulemaking, 20 FCC Rcd 1233 (2004) (*Further Notice*); *see also Further Notice*, 2004 WL 2187191(FCC). A list of parties filing comments and reply comments in these dockets is set forth in Appendix B.

[18] Petition at 2-3. An inside wire subloop is defined as "all loop plant owned or controlled by the incumbent LEC at a multiunit customer premises between the minimum point of entry as defined in § 68.105 of this chapter and the point of demarcation of the incumbent LEC's network as defined in § 68.3 of this chapter." 47 C.F.R. § 51.319(b)(2).

[19] Petition at i. Although Cox uses the term MTEs, the Commission uses the term "multiunit premises" in the inside wire subloop rule. 47 C.F.R. § 51.319(b)(2).

MTEs.[20] Cox also claims that Commission action is needed "to resolve an emerging split" among state commissions over the manner that requesting carriers must be granted access to the inside wire subloop.[21] According to Cox, the state commissions of New York, Washington, and Georgia have all adopted access rules more favorable to requesting carriers,[22] but Oklahoma has varied by adopting a rule[23] that requires Cox "to employ burdensome ordering procedures, [and] undertake needless and time-consuming construction of new facilities."[24] Cox further states that under two of SBC's proposals, Cox would be required to construct, or pay SBC to construct, unnecessary intermediate facilities between SBC's and Cox's terminal facilities in each MTE.[25] Each of these options would increase both the cost of providing service to MTE customers and the time - sometimes as long as 120 days - it would take Cox to initiate service to a requesting customer.[26] Cox claims that SBC would maintain the enormous competitive advantage inherent in operating legacy facilities that can be used to initiate service in a matter of hours or

[20] *See* Petition at 2 (citing *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 96-98, 98-147, 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*Triennial Review Order*), *corrected by Errata*, 18 FCC Rcd 19020 (2003), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *cert. denied sub nom. National Ass'n Regulatory Util. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313, 316, 345 (2004). Cox also asserts that these rights are supported by the Wireline Competition Bureau's *Virginia Arbitration Order. Petitions of WorldCom, Inc., Cox Virginia Telecom, Inc. and AT&T Communications of Virginia Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, 17 FCC Rcd 27039 (WCB 2002) (*Virginia Arbitration Order*)).

[21] Petition at 1.

[22] *Id.* at 17-18 (citing *Staff's Proposal to Examine the Issues Concerning the Cross-Connection of House and Riser Cable*, Order Granting Direct Access Cross-Connections to House and Riser Facilities, Subject to Conditions, Case No. 00-C-1931 (NY Pub. Serv. Comm'n rel. June 8, 2001) (*New York Order*); *AT&T Communications of the Pacific Northwest, Inc. v. Qwest Corporation*, Second Supplemental Order, Docket No. UT-003120 (Wash. Pub. Util. and Trans. Comm'n rel. April 5, 2001) (*Washington Order*); *Petition of AT&T Communications of the Southern States, Inc. and Teleport Communications Atlanta, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996*, Order, Docket No. 11853-U (Ga. Pub. Util. Comm'n rel. Mar. 6, 2001) (*Georgia Order*).

[23] Petition at 6-7 (citing *Report and Recommendations of the Arbitrator*, Docket No. PUD 200300157, Report and Recommendations of the Arbitrator (OCC rel. April 2, 2004) (*Arbitrator's Report*); *Final Order Adopting and Modifying the Arbitrator's Report*, Order No. 491645, OCC Docket No. PUD 200300157 (OCC rel. June 28, 2004) (*OCC Order*).

[24] Petition at 2; *see infra* para. 9 (describing SBC's proposed options). Cox asserts that under all three options, Cox must "rely on [SBC] technicians to establish service connections for MTE customers wishing to subscribe to Cox's telephone service." Petition at 2. Cox adds that during the time its petition has been pending before the Commission, the Kansas Corporation Commission "issued an order that parallels the Oklahoma decision in all material respects." *See* Letter from J.G. Harrington, *et al.*, Counsel to Cox Communications, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-338 at 2 (filed June 2, 2006).

[25] *Id.* at 7.

[26] *Id.*

a few days. Cox also contends that the *OCC Order* inappropriately applied state law to questions the Commission has already settled.[27]

2. Oklahoma Proceedings

9. In October 2002, Cox and SBC began negotiating an amendment to their existing interconnection agreement (ICA) that would govern the rates, terms, and conditions of inside wiring subloop access. After failing to reach an agreement, Cox submitted the issue to arbitration before the OCC pursuant to section 252(b) of the Act.[28] In the arbitration proceeding, Cox asserted that the Act and the Commission's rules and orders mandate that competitive LECs' technicians must be given direct physical access to SBC's inside wire subloops at existing SBC terminals for the purposes of accomplishing installation and service changes.[29] SBC denied that Cox had a right of direct physical access to its inside wire subloops.[30] Instead, SBC proposed three options, each of which would require Cox to use SBC technicians to provide access to the inside wire subloop: (1) an intermediate cross-connect device that SBC would place or construct, own, and manage; (2) an intermediate cross-connect device that Cox would place or construct, own, and manage; (3) SBC's provisioning of inside wire subloops by extending jumper/cross connect wire from its existing accessible terminal, left coiled up near Cox's terminal.[31]

10. On April 2, 2004, the arbitrator issued a report adopting, in its entirety, SBC's proposal.[32] In reaching that conclusion, the arbitrator accepted SBC's assertions that denial of direct access was essential to the integrity of SBC's network.[33] Specifically, the arbitrator found that "direct access" to the terminal block "is not in the public interest," and "may seriously jeopardize SBC-OK's ability to maintain network integrity, security and control, as well as accountability for damage and substandard engineering and operational practices."[34] Cox appealed the matter to the full OCC, which affirmed the *Arbitrator's Report* on this issue.[35]

11. Cox challenged the OCC's decision in the U.S. District Court for the Western District of Oklahoma. Cox then asked the court to stay the proceeding pending Commission resolution of the instant petition for declaratory ruling.[36]

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[27] *Id.* at 12-15.

[28] *Id.* at 6.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 6-7.

[32] *Arbitrator's Report.*

[33] *Id.* at 45.

[34] *Id.*

[35] Petition at 7-8. The *OCC Order* affirmed the *Arbitrator's Report* without detailed discussion, and with only slight modifications. *OCC Order* at 1-2. Accordingly, our discussion of the *Arbitrator's Report* also applies to the *OCC Order* adopting it.

[36] The court granted the stay on January 18, 2005. Petition at i. More recently, on February 23, 2007, SBC filed a motion to vacate the stay on the grounds that more than two years have passed and the Commission has not acted on Cox's petition. *Cox Oklahoma Telecom, L.L.C. v. Corporation Commission of the State of Oklahoma and* (continued....)

III. DISCUSSION

A. Cable Inside Wiring Rules

12. The Court asserted that the Commission did not adequately support its conclusion that wiring behind sheet rock is "physically inaccessible" for purposes of the inside wiring rules.[37] The Commission in 2003 had stated that it considered sheet rock to be a "structural element" and reasoned that it was "more like 'brick or cinder block,' materials also commonly used to form ceilings and hallways, than molding, which is not."[38] The Court found that the Commission had not explained why or how accessing wiring behind sheet rock requires "significant modification of, or significant damage to" the sheet rock.[39] The Court also found that the Commission failed to explain the relative nature of the "damage" or "modification" related to accessing wiring behind sheet rock, and therefore that the Commission's conclusion regarding physical inaccessibility lacked adequate evidentiary support.[40]

13. The Court also criticized the Commission's assessment of whether accessing cable wire behind sheet rock would "add significantly to the physical difficulty and/or cost" of accessing the subscriber's home wiring.[41] The Court stated that while the Commission acknowledged that cutting through sheet rock is easier than boring through brick, metal, or cinder block, it did not support the conclusion that the lesser physical difficulty and cost are "significant."[42]

14. In response, the Commission sought additional comment with respect to whether cable wiring behind sheet rock should be considered physically inaccessible.[43]

(Continued from previous page)
Southwestern Bell Telephone, L.P., d/b/a SBC Oklahoma, Case No. CIV-04-1282-M, Motion of AT&T Oklahoma to Vacate Stay (filed Feb. 23, 2007). In its motion, SBC states that at the time of the filing of this case, Southwestern Bell Telephone, LP was doing business as "SBC Oklahoma" but now it is doing business in Oklahoma as "AT&T Oklahoma." On March 22, 2007, the court denied SBC's motion to vacate the stay, and directed Cox to file status reports every three months until the Commission issues its decision. *Cox Oklahoma Telcom, L.L.C., v. Corporation Commission of the State of Oklahoma and Southwestern Bell Telephone, L.P., d/b/a SBC Oklahoma*, Case No. CIV-04-1282-M, Order (W.D. Okla. Mar. 22, 2007).

[37] *See Appeals Court decision* at 3. The term "inside wiring" incorporates both cable home run wiring and cable home wiring. *See* n.2, *supra.*

[38] *Reconsideration Order*, 18 FCC Rcd at 1362.

[39] *See Appeals Court decision* at 3; *see also* 47 C.F.R § 76.5(mm)(4)(i).

[40] *See Appeals Court decision* at 3.

[41] 47 C.F.R. § 76.5(mm)(4)(ii).

[42] *See Appeals Court decision* at 3, citing *Reconsideration Order*, 18 FCC Rcd at 1362.

[43] *Further Notice*, 20 FCC Rcd at 1235. In the *Further Notice*, the Commission set forth its premise that what preexisting structural elements should be included for purposes of determining the demarcation point and what is considered to be an accessible or inaccessible location should be based on practicality. In the *Reconsideration Order*, the Commission incorporated its response to a Request for Letter Ruling from RCN-BeCoCom, L.L.C. (*RCN Request for Letter Ruling*) asking the Commission to address the issue of whether cable wiring behind sheet rock is "physically inaccessible," such that the demarcation point should be located not at the twelve inch mark, but rather at the operator's junction box. Based on the *RCN Request for Letter Ruling* and responses to that request, the Commission incorporated sheet rock as one of the examples of materials to be considered as a "preexisting structural element" in its definition of physical inaccessibility. *See Reconsideration Order*, 18 FCC Rcd at 1362. Our analysis on this issue was based, in part, on the *RCN Request for Letter Ruling*. *See Notice*, 20 FCC Rcd at n.21.

1. Would accessing the demarcation point behind sheet rock require significant modification of, or significant damage to, preexisting structural elements?

15. As explained below, we find that sheet rock is a preexisting structural element and that accessing inside wiring behind sheet rock would cause significant modification and damage to that structural element.

16. The Commission specifically sought comment on whether sheet rock qualifies as an example of a preexisting structural element that is an integral and permanent part of an MDU.[44] The Commission also asked if it is likely that many MDU owners and managers would not allow new service providers to cut, open, spackle, sand, and paint or replace wallpaper or other finishings on the common walls and ceilings on each floor of their MDUs in order for installers to complete their work.[45] The Commission asked whether the damage to or modification of ceilings and walls made by alternative providers in accessing inside wiring should be considered significant.[46]

17. The majority of commenters in this proceeding, comprised of alternative providers and trade associations that service the MDU communities, agree that cable inside wiring located behind sheet rock is physically inaccessible because access to such wiring would involve significant modification of, or damage to, a preexisting structural element.[47] These commenters offer what they term their "real world" experiences and urge the Commission to continue to support the expansion of the definition of "physically inaccessible" to include sheet rock for purposes of the inside wiring rules.[48] They argue that this is not a theoretical analysis, but rather a reflection on the world of day-to-day competition, contract negotiation and installation of equipment to provide service to MDU residents.[49] Some assert that these rules serve to stimulate competition and have made it possible for hundreds of thousands of residents to subscribe to the services provided by alternative providers.[50] These commenters argue that it is essential that the current definition of "physically inaccessible," which includes wiring behind sheet rock, be maintained in order for the inside wiring rules to be effective.[51]

18. NCTA argues that wiring behind sheet rock does not meet the test of "physical inaccessibility."[52] NCTA asserts that the practical questions surrounding the issue of the physical

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[44] *Further Notice*, 20 FCC Rcd at 1235.

[45] *Id.*

[46] *Id.*

[47] *See* IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 4-5; RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5; RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3; Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2.

[48] *See* IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2; RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2.

[49] *Id.*

[50] *See* IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3.

[51] *See* IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3; RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3; RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2; Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2.

[52] *See* NCTA Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at [illegible].

inaccessibility of wiring behind sheet rock do not naturally occur within the regulatory or policy expertise of the Commission.[53] NCTA contends that the existing record in this proceeding already contains a variety of affidavits and declarations that support its position submitted by commenters who engage in this line of work.[54] NCTA also submits additional declarations and affidavits in support of its position.[55]

a. Sheet Rock as a Preexisting Structural Element

19. The Commission previously concluded that the term "structural elements" encompassed sheet rock.[56] The majority of commenters here assert that it is well-established that sheet rock is a preexisting structural element that is an integral and permanent part of the building structure of MDUs.[57] RAA & CAI state that sheet rock is installed as part of the construction of the building and it is integral to the overall structure: without sheet rock, some other material – such as brick or cinder block – would have to be used to form walls and other building elements.[58] Moreover, sheet rock is permanently fixed to the framing structure of the building and is not readily removed or designed to be removed.[59] RAA & CAI further assert that sheet rock is not a mere surface finish or decorative flourish and, for that same reason, it is clearly "preexisting" because it is not added after the building is completed.[60]

20. RCN states that to access facilities behind sheet rock, whether it be wiring, ducts, pipes or other types of utility conduit, the opening up and closing of sheet rock is not as simple a matter as opening and closing an electrical panel.[61] Moreover, RCN asserts that sheet rock is not easily removed or replaced in the same manner as removable hallway molding.[62] RCN argues that the only alternative to cutting holes in sheet rock to access facilities would be to remove and replace an entire wall or ceiling.[63] From a materials point of view, RCN acknowledges that while it is not difficult to cut through sheet rock, the cost and damage associated with accessing a demarcation point behind sheet rock are significant

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[53] *Id.*

[54] *Id.*

[55] *Id.* at 4; NCTA Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 5.

[56] *Reconsideration Order*, 18 FCC Rcd at 1362.

[57] IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 4; RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3; RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3.

[58] *See* RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3 and Exhibit D (Declaration of Greg O'Berry, President of AMLI Management Company, a subsidiary of AMLI Residential Properties Trust, at para. 3); *see also* IMCC Reply Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2.

[59] *Id.*

[60] *Id.*

[61] *See* RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3 and Attachment A (Affidavit of John Holbert, ISP Construction Manager for RCN-BecoCom, LLC at para. 5).

[62] *Id.*

[63] *Id.*

enough to render it physically inaccessible.[64] RCN contends that these factors of inaccessibility are exacerbated by the integral and permanent nature of sheet rock.[65]

21. NCTA counters that sheet rock is not considered to be a structural element because it is easy to cut and repair.[66] According to NCTA, installers commonly need to make cuts and/or holes in sheet rock walls and other nonstructural building materials in order to access home wiring.[67] NCTA contends that such procedures are neither difficult nor expensive for experienced installers to perform and there should be no adverse impact on the structural integrity of the sheet rock.[68]

22. We agree with those commenters who contend that sheet rock is a preexisting structural element and not merely a surface finish or decorative finish like molding. Sheet rock is not added after a building is completed. Sheet rock is a fundamental component of the construction of the building. Thus, sheet rock is more like "brick or cinder block" because it is commonly used to form ceilings and walls in MDUs and other structures. We believe that ceilings and walls are an integral and permanent part of the building structure of MDUs, and therefore, sheet rock used to form ceilings and walls qualifies as a preexisting structural element for purposes of the Commission's rules.[69]

b. Assessing Significant Modification of, or Significant Damage to, Sheet Rock

23. The Commission sought comment on whether the modification of, or damage to, sheet rock ceilings and walls by alternative providers accessing inside wiring behind those ceilings and walls should be considered significant.[70] The assessment of significant modification or damage must be made regarding a preexisting structural element before that location is deemed to be physically inaccessible.[71] When characterizing the modification of or damage done to sheet rock in efforts to access inside wiring, the majority of commenters agree that the modification of or damage done is significant.[72]

24. Several commenters explain that cutting through sheet rock involves careful, difficult, and labor-intensive work. RCN explains that when it is required to access the demarcation point through sheet rock, its actions result in significant modification and damage to the walls and ceilings of the MDUs.[73] RCN attests to the fact that it must cut a hole in the sheet rock that is at least 12" by 12" in

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[64] *Id.*

[65] *Id.*

[66] NCTA Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5 and Attachment A (Declaration of David Jordon, Construction Coordinator, Bright House Networks at para. 2).

[67] *Id.* and Attachment A (Declaration of Joseph Danno, Vice President of Midtown Express, Inc. at para. 4).

[68] *Id.* at 6 and Attachment A (Declaration of John Kuhn, President and CEO for Prince Telecom, Inc. and William J. Kelly, Executive Vice President for General Fiber Communications at paras. 3-5).

[69] 47 C.F.R. § 76.5(mm)(4)(i).

[70] *Further Notice*, 20 FCC Rcd at 1235.

[71] 47 C.F.R. § 76.5(mm)(4)(i).

[72] IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6; RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5; RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3; Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2.

[73] RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 4.

order to gain access to wiring behind sheet rock.[74] RCN further notes that cutting through sheet rock with a knife or similar tool results in the creation of considerable dust and debris and an effort must be made to avoid damage to elements behind sheet rock, such as electrical wiring, insulation, duct work and plumbing.[75] RCN states that although cutting through sheet rock is relatively easy, the process results in permanent damage to MDU walls or ceilings and the holes that remain must be repaired.[76] RCN states that in order to repair the damage, subcontractors must "plug" the hole by cutting another piece of sheet rock that is large enough to fill the hole.[77] The hole must be spackled, taped and sanded and the area around the hole must later be repainted or re-wallpapered to the satisfaction of MDU managers and owners.[78] RCN contends that the whole wall or ceiling may need to be repainted or re-wallpapered in order to restore a uniform appearance.[79]

25. Commenters also note that they must pay careful attention to aesthetic considerations. IMCC states that each penetration or hole in the wall or ceiling must be patched twice, sanded twice, primed and painted to match the prior paint.[80] IMCC also comments that the work requires a minimum three-day time period and requires several hours of labor, and that part of the job in many "upscale" properties involves entire hallways being repainted or re-wallpapered.[81] Similarly, RAA and CAI state that property owners are concerned with the appearance of their buildings, and that as a result, any work involving cutting into sheet rock requires meticulous restoration.[82] These commenters assert that this is no small task because obtaining access to wiring behind sheet rock requires the removal of sizable pieces of sheet rock, not only at the demarcation point, but at times at other places along the corridor or inside different units.[83] RAA & CAI argue that property owners do not know exactly where wiring is located and finding hundreds of demarcation points within a building is not a precise science.[84]

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[74] *Id.* and Attachment A (Affidavit of John Holbert, ISP Construction Manager for RCN-BecoCom, LLC at para. 8). *See also* IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6 (explaining that in order to connect to home run wiring at the demarcation point, a 6" to 18" square or rectangle must be cut into the wall or ceiling); *Ex Parte* Verizon filing at 4 (Declaration of Daniel VanRoekel, Senior Engineer, Outside Plant Engineering dated June 22, 2005) (stating that an installer would need to cut approximately a 9" x 9" hole in the ceiling or wall because a smaller hole would not be large enough to permit the installer to perform the work required to attach the new home run wire to the home wiring).

[75] RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 4 and Attachment A (Holbert Affidavit at para. 8).

[76] *Id.*

[77] *Id.* and Attachment A (Holbert Affidavit at para. 9).

[78] *Id.*

[79] *Id.* Moreover, RCN argues that repeated access to the sheet rock may eventually lead to the disintegration of the structural element and may require that a whole wall or ceiling be replaced. *Id.*

[80] IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6.

[81] *See Id.*; RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6 and Attachment F (Declaration of Michael T. Tremmel, Manager of External Infrastructure of Forest City Residential Management, Inc., at para. 4) (noting that restoring the smoothness and texture of a wall and matching paint and wallpaper are difficult tasks).

[82] RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6.

[83] *Id.* and Attachment D (Declaration of Greg O'Berry, President of AMLI Management Company, at para. 4).

[84] *Id.* and Attachment B (Declaration of Lyn Lansdale at para. 5).

26. Commenters also raise safety issues. RAA & CAI state that any action that affects the structural integrity of a building is considered significant by property owners.[85] RAA & CAI explain that there are special types of sheet rock for specific applications and cutting into these different types of sheet rock to gain access to wiring may result in a degradation of a building's resistance to moisture, or its sound or temperature insulating capability, as well as its resistance to fire.[86] From a safety perspective, RAA & CAI assert that the use of sheet rock in firewalls means that any breach of a sheet rock surface poses a safety risk to residents and may involve a code violation for which property owners are liable.[87] RAA & CAI state that cuts in specialty types of sheet rock that affect the building's resistance to water damage, or its sound or temperature insulating capacity, will concern building owners and may lead to damage to the "fabric" of the building over time.[88] Similarly, Verizon states that cutting into or patching sheet rock walls and ceilings compromises the integrity of fire resistant sheet rock and may pose a safety hazard for MDU residents if such work is not done properly.[89]

27. Finally, RAA and CAI argue that under the National Electric Code (NEC), wiring behind sheet rock is not considered accessible because it cannot be removed or exposed without causing damage to the structure or finish of the building.[90] While not binding on the Commission, RAA & CAI assert that NEC's definition should be instructive to the Commission because it represents the judgment of experts in the field of building safety.[91]

28. NCTA, however, argues that the existing record establishes that wiring located behind sheet rock does not meet the test of "physically inaccessibility."[92] NCTA points to a previously filed declaration that it is not difficult to access the demarcation point of each unit through a 2" x 4" hole cut

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[85] RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5.

[86] *Id.* at 4. RAA & CAI explain that any gaps or holes in a firewall can allow heat and flame to penetrate a firewall and any penetrations must be repaired carefully to restore the fire rating of the breached element of the structure. *Id.* and Attachment B (Declaration of Lyn Lansdale, Vice President of AvalonBay Communities, Inc. at para. 3) and Attachment E (Declaration of Henry Pye, Director of Resident Services and Technology for JPI Partners, LLC para. 5). *See also* http://www.nhci.com/sheetrock.html. The information on this web site in supplied by the National Home Centers, Inc., a commercial building materials supplier.

[87] *Id.* at 5. *See also* International Building Code (IBC) (2003 ed.) § 712 (addressing penetrations in firewalls). RAA & CAI note that 44 states and the District of Columbia have adopted the IBC. *See* http://www.iccsafe.org/government/adoption.html. RAA&CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at n.5.

[88] RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5-6.

[89] Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6. Verizon argues that if cable installers cut into sheet rock walls and ceilings, additional precautions must be taken and additional expenses incurred to ensure that the sheet rock is properly repaired in accordance with building code standards. *See id.* and attached Declaration of P. Kelley Dunne, Executive Director for Network Operations for Verizon Avenue, at para. 9.

[90] *See* RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 9 (noting that NEC defines "accessible," for purposes of wiring methods, as "[c]apable of being removed or exposed without damaging the building structure or finish or not permanently closed in by the structure or finish of the building," and that such wiring is permanently closed in by the structure or the finish); *see also* NEC Art. 100 (2005 ed.). The NEC is promulgated by the National Fire Protection Association.

[91] *Id.*

[92] NCTA Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5.

into the hallway sheet rock wall.[93] That declarant stated that after the cut in the sheet rock is made and the old MVPD's wiring is taped off, the hole is repaired either by patching and repainting or adding a wall plate that matches the interior of the building; a procedure the declarant described as not difficult and one having no adverse impact on the structural elements or integrity of the building.[94] NCTA also resubmits an affidavit from an industry representative that states that cutting, drilling opening, plugging, spackling, taping, sanding, painting and repairing sheet rock are insignificant and commonplace procedures that do not result in significant modification of or damage to a building's structural elements.[95]

29. NCTA also offers more recent declarations and affidavits to support its position that cable wiring behind sheet rock can be readily accessed without incurring damage to structural elements.[96] For instance, NCTA submits the declaration of an independent contractor that states that in the typical MDU building, it is not difficult to access the demarcation point through a small cut in the hallway sheet rock, that installers can interconnect wires quickly and cheaply and that the repair work for an experienced installer is not difficult and has no adverse impact on the aesthetics or structural integrity of the building.[97] NCTA also argues that the procedure for accessing wiring behind sheet rock is not significantly more difficult or expensive than accessing wiring that is behind molding.[98] With regard to the issues of structural integrity and fire safety, NCTA states that while sheet rock walls do provide shear resistance and fire protection, there is nothing about cutting and properly repairing a small hole in the sheet rock that should affect its structural integrity or fire resistance.[99]

30. When analyzing this issue we are faced with two substantially different points of view on whether significant modification or damage to preexisting structural elements occurs when efforts are made to access cable wiring behind sheet rock. Most commenters, consisting of alternative providers and trade associations, contend that large holes – 12"x 12" or 6"x 8" – must be cut into the sheet rock in order to access wiring, while NCTA asserts that only a 2"x 4" inch hole must be made. Most commenters also emphasize the difficulty of locating demarcation points and making numerous cuts into the walls, and contend that the repair and restoration of the common walls and ceilings frequently require extensive and time-consuming work. Most commenters also focus on fire and other safety issues including the possible degradation of a building's resistance to moisture and potential problems associated with its sound and temperature insulating capability once the process of accessing wiring begins.

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[93] *Id.* and Attachment B (Declaration of Al Costanzi, Time Warner Cable Vice President/Northeast Ohio at para. 6, filed with Opposition of Time Warner Cable on Oct. 22, 1998).

[94] *Id.*

[95] *Id.* at 4 and Attachment B (Affidavit of John Donahue, Vice President of Engineering for Comcast Cable Communications, Inc. at para. 4, filed with Comments of Comcast Cable Communications, Inc. filed on Oct. 22, 1998).

[96] NCTA Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 4.

[97] *Id.* and Attachment A (Declaration of John Chamberlain, President of JC Communications, at para. 4); *see also* Declaration of David Jordan, Construction Coordinator for Bright House Networks at para. 2 and Declaration of Joseph Danno, Vice President of Midtown Express, Inc. at paras. 4-7.

[98] *Id.* at 6 and Attachment A (Affidavit of John Kuhn, President and CEO for Prince Telecom, Inc. at para. 6 and Affidavit of William J. Kelly, Executive Vice President for General Fiber Communications at para. 6).

[99] *See Id.* at 6 and Declaration of Joseph Dano, Vice President of Midtown Express, Inc. at para. 9.

31. We believe the record supports the conclusion that accessing inside wiring behind sheet rock causes significant modification and damage to structural elements, i.e., walls and ceilings, albeit modification and damage that may be repairable. MDU resident owners and their managers are not only concerned with the condition of individually-owned units or apartments, but also with the condition of the common elements in these structures. For example, the record reveals that MDU resident owners and their managers will sometimes require an entire wall or ceiling to be repainted or re-wallpapered even where the hole cut in the sheet rock is significantly smaller than the wall or ceiling in order to restore the area to its original appearance. Requiring such extensive repair is a strong indication that there has been significant modification or damage to the pre-existing structural area. Unlike with single family residences, MDU residents share common walls and ceilings and have an interest in the condition and treatment of those common elements. With regard to the issues of fire safety and possible degradation of a building's resistance to moisture, we take a conservative approach and give credence to the commenters who argue that cutting into sheet rock may pose a safety risk or affect a building's resistance to moisture and thus may lead to significant modification or damage to such structural elements. Consequently, we conclude that penetration of sheet rock for purposes of accessing inside wiring constitutes significant modification and damage to structural elements under the Commission's rules.

c. Access of New Service providers by MDU Owners and Managers

32. We conclude that the refusal of MDU owners to permit competitive providers to cut into sheet rock walls attests to the significance of the work involved. The Commission asked if it is likely that many MDU owners and managers would not allow new service providers to cut, open, spackle, sand, and paint or replace wallpaper or other finishings on the common walls and ceilings on each floor of their MDUs in order for installers to complete their work.[100] The majority of commenters agree that competition from new service providers in MDUs is impeded because MDU owners and managers do not want new providers on the premises cutting and repairing sheet rock because it causes damage to a preexisting structural element in the building and the process is disruptive to building residents.[101]

33. RCN asserts that it has been clearly demonstrated in the Commission's earlier proceedings on this issue that many MDU owners are reluctant to permit overbuilders to cut holes in their walls and ceilings.[102] In referring to its own past experiences, RCN contends that MDU owners and managers will not allow RCN to cut, open, plug, spackle, tape, sand and paint ceilings and walls in order to install new lines because it is disruptive and could eventually require the replacement of entire ceilings and walls.[103] RCN argues that if an MDU owner prohibits a competitive provider from cutting holes in a building's walls and ceilings in order to access the home run wiring then it is physically impossible to access these

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[100] *Further Notice*, 20 FCC Rcd at 1235.

[101] IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5; RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2, 6; RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6-7; Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2-3.

[102] *See* Letter to Deborah A. Lathen, Chief, Cable Services Bureau, from William L. Fishman, Swidler, Berlin, Shereff & Friedman, LLP, Inside Wiring – Request for Letter Ruling (September 23, 1998). *See also supra* para. 31.

[103] *Id.* and RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6 and Attachment A (Affidavit of John Holbert, Construction Manager for RCN-BecoCom, LLC at para. 9). RCN gives an example of being foreclosed from serving 209 units in a building in Boston because the owner of the apartment building refused to allow RCN to cut through walls and ceilings in order to access the demarcation point twelve inches outside each unit. RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6 and Attachment A (Holbert Affidavit at para. 4).

lines.[104] RCN argues that if MDU owners won't allow access to home run wiring through sheet rock and the incumbent cable operator won't allow a competitor access at the junction box, then new entrants are precluded from providing competitive video service to consumers.[105] Verizon agrees that the refusal by MDU owners and residents to allow competing providers to cut into sheet rock to access home run wiring makes such wiring inaccessible for practical purposes.[106] Verizon argues that meaningful competition for cable services for millions of Americans living in MDUs is inhibited because MDU owners and residents consider cutting and repairing sheet rock a significant inconvenience and new entrants are placed at a competitive disadvantage.[107] RAA & CAI agree and add that any action that harms the appearance of the building presents significant problems.[108] They state that cutting and repairing drywall is a messy process and is the kind of disruption that residents want to avoid whenever possible.[109] IMCC asserts that the resistance of MDU owners and residents to physical degradation of their property and the associated inconvenience and cost are the reasons contract negotiations between MDU owners and alternative providers fail and the incumbent cable provider remains entrenched.[110]

34. NCTA argues that whether building owners choose to allow cable operators to access wiring behind sheet rock is not and should not be relevant to the determination whether such wiring is physically inaccessible.[111] NCTA asserts that there is nothing in the Commission's definition of physical inaccessibility that suggests that the owners' willingness to allow a service provider to access wiring at a particular point should determine whether that point is, in fact, accessible.[112]

35. Although the Commission's rule defining physical inaccessibility does not specifically take into account the willingness of MDU owners and managers to allow new service providers to cut and

[104] *Id.* at 6.

[105] *Id.* at 6-7. We disagree with Time Warner Cable that our ruling today effectively concludes that the demarcation point is located at the incumbent's junction box. Specifically, Time Warner Cable expresses concern that allowing competitive access to the junction box will cause security and signal leakage issues. *See* Letter from Arthur Harding, Counsel for Time Warner Cable, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 95-184, MM Docket 92-260 at 2-3 (filed May 23, 2007). We note that this argument was made and answered in the *Report and Order and Second Further Notice*, where the Commission stated that "[t]he procedures we are adopting, however, do not grant alternative providers, subscribers, or MDU owners access to the incumbent provider's riser cable or lockbox and therefore do not pose the safety concerns about which Congress was concerned." *Report and Order and Second Further Notice*, 13 FCC Rcd at 3707. We note that exactly where the wiring will become accessible (because it is no longer behind brick, cinderblock, or sheetrock) will vary building by building. As the Commission noted in the *Report and Order and Second Further Notice*, "[t]he incumbent provider must disconnect the home run wiring from its lockbox and leave it accessible for the new provider within 24 hours of actual service termination." *Id.* at 3688.

[106] Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 2.

[107] *Id.* and attached Declaration of P. Kelley Dunne, Executive Director for Network Operations for Verizon Avenue at para. 2. Verizon Avenue is an affiliate of Verizon Communications, Inc. that focuses on providing communications and video services to residents of MDUs. Dunne Declaration at para. 1.

[108] RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6 and Exhibit B (Declaration of Lyn Lansdale, Vice President of AvalonBay Communities, Inc. at para. 4); *see also* Exhibit E (Declaration of Henry Pye, Director of Resident Services and technology for JPI Partners, LLC at para. 4).

[109] *Id.*

[110] IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5.

[111] NCTA Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6.

[112] *Id.* and NCTA Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 4.

repair sheet rock, the refusal by building owners to permit competitive providers to cut into building walls, even sheet rock walls, suggests that the consequences of doing so are significant to the building owners.[113] This fact supports the proposition that accessing wiring behind sheet rock exposes the walls to significant modification or damage.

2. Would accessing the demarcation point behind sheet rock add significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring?

36. As explained below, we find that accessing the demarcation point behind sheet rock adds significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring.

37. The majority of commenters agree that accessing the demarcation point behind sheet rock adds significantly to the physical difficulty and cost of accessing the subscriber's home wiring.[114] NCTA disagrees and argues that there is no significant expense or difficulty associated with such work.[115] The Commission has acknowledged that while cutting through sheet rock is neither as physically difficult nor as costly as boring through brick, metal or cinder block, it was satisfied that the process added significantly to the physical difficulty and cost of wiring an MDU.[116] The Commission stated that the examples listed in the original Note to Section 76.5(mm)(4) regarding various materials that can be considered structural elements capable of concealing a coaxial cable was not meant to be exhaustive.[117] Moreover, the Commission sought comment on the costs associated with cutting through sheet rock. The Commission further stated that it would seem that the difficulty and costs associated with cutting through sheet rock are significantly more than what is involved in accessing wiring behind removable molding, and sought additional comment on the costs of accessing wiring behind molding. The Commission previously determined that wiring enclosed within hallway molding is not physically inaccessible.[118]

a. Assessing the Physical Difficulty Involved in Accessing Wiring Behind Sheet Rock

38. In assessing the physical difficulty involved in accessing cable wiring located behind sheet rock, many commenters describe a process that involves more than simply cutting through the material. For example, IMCC states that once a hole is cut in the sheet rock and the wire connection is made at each unit, the wire must either be "fished" through the hallway and back to the junction box or pedestal or it must be installed in some form of molding.[119] RCN states that once it has cut a hole in the sheet rock there are no guarantees that where it cuts the hole it will actually be able to locate and retrieve the inside

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[113] *See* 47 C.F.R. § 76.5(mm)(4).

[114] IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5; RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5; Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 4; RAA & CAI Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 1.

[115] NCTA Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 4; NCTA Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 5.

[116] *Further Notice*, 20 FCC Rcd at 1236; *see also Reconsideration Order*, 18 FCC Rcd at 1362.

[117] *Id.* at 1236.

[118] *See* Note to 47 C.F.R. § 76.5 (mm)(4).

[119] IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6.

wiring for interconnection with its own subscriber lines.[120] If this is the case, RCN explains that it must then cut additional holes in the sheet rock until it can locate and retrieve the existing subscriber line.[121] RCN states that once the line has been retrieved, it must then connect its own subscriber line to the existing subscriber line at the demarcation point.[122] Thereafter, RCN describes the ensuing difficulty of running its own subscriber line back to the junction box to its network interface.[123] RCN states that this process can be extremely difficult to undertake behind sheet rock, particularly in MDUs where, RCN asserts, it faces unknown obstacles such as heating ducts, water pipes, and other facilities.[124] When encountering such obstacles, RCN states that it may be necessary to cut additional holes in the sheet rock to avoid them.[125] Verizon asserts that when MDUs are constructed, inside wiring is generally run without concern for the path that the wiring will take to get to a particular unit.[126] Moreover, Verizon states that attention is rarely paid to ensuring post-construction ready-access to wiring for particular units, such as through "chase-ways."[127] As a result, Verizon argues that running cable wiring behind sheet rock is invasive and often requires access not only to the particular unit seeking service, but also to one or more of the abutting units.[128] Verizon argues that established industry practice in the context of telephone wiring confirms that many of the practical difficulties of installing or accessing wiring behind sheet rock walls or ceilings make such wiring inaccessible for all practical purposes.[129] Verizon asserts that in order to avoid the problems with accessing wiring that is behind sheet rock in an MDU, Verizon's state telephone tariffs generally provide concealed telephone wiring in MDUs where "reusable means" for accessing the wiring are installed.[130]

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[120] RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 5 and Attachment A (Affidavit of John Holbert, Construction Manager for RCN-BecoCom, LLC at para. 7). RCN describes home run wiring as "subscriber lines." *See* RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 1.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3 and attached Declaration of P. Kelley Dunne, Executive Director for Network Operations for Verizon Avenue at para. 3.

[127] *Id.*

[128] *Id.* and Dunne Declaration at para. 4. As an example, Verizon states that in order to run cable wiring to a unit on the second floor of a three-story MDU, an MVPD installing the wiring might require access to units above, below, or beside the unit seeking service in order to "fish" the wire through walls and floors. Verizon asserts that this process could require cutting into a neighbor's sheet rock walls and ceilings and may become more difficult if the adjoining units don't correspond, thereby requiring additional modification to these structures in order to accommodate the wiring. *Id.*

[129] Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 7.

[130] *Id.* As an example, Verizon points to its tariff in Massachusetts which addresses "concealed wiring" by stating: "For the initial establishment of service, the Telephone Company installs concealed wiring in residential buildings during construction where post-construction wiring is not feasible and where, if riser cable plant is required, the customer or builder provides conduit or other *reusable means satisfactory to the Telephone Company to reach each floor and each suite on each floor . . . .*" New England Telephone and Telegraph Company, Tariff DTE MA No. 10, Exchange and Network Services, § 2.2.2(A) Concealed Wiring (emphasis added). *Id.* at n.3.

39. NCTA counters that commenters have confused the difficulties and costs of accessing home run wiring at the demarcation point with that of installing their own home run wiring behind sheet rock.[131] NCTA argues that the comments of RCN and Verizon are not on point when they assert that running new cable wiring behind sheet rock is invasive and that new service providers must "fish" wire through interior walls and ceilings.[132] NCTA argues that the rules governing the disposition of home run wiring do not allow alternative providers to acquire and use such wiring simply because it is easier and less costly than to install their own.[133] NCTA notes that once an alternative provider is able to access the wiring at the demarcation point, the home run wiring rules provide procedures for the disposition of such wiring if the incumbent finds it is too difficult or costly to remove.[134] NCTA argues that whether a demarcation point located behind sheet rock is physically inaccessible does not depend on whether installing new home wiring behind sheet rock is difficult, expensive or causes damage to the building.[135] All that matters, NCTA asserts, is whether accessing wiring at such a point would cause significant structural damage, difficulty, and expense.[136]

40. As an initial matter, we note that a finding of "physical difficulty" is not required because our rule requires that we find that cutting through the sheet rock would add significantly to the physical difficulty **and/or** costs of accessing the subscriber's home wiring. Nevertheless, we conclude that the record supports a finding of significant physical difficulty in accessing the subscriber's home wiring.[137] Accessing such wiring requires some level of physical harm to the property – *i.e.*, access holes cut in the sheet rock – and that the property be restored to its original integrity and appearance. As we have recognized throughout this decision, the repair is not always limited to the hole(s) cut; it can include repainting and/or re-wallpapering necessary to restore the premises. Those tasks can add significantly to the physical difficulty involved in accessing the wiring, certainly as compared to accessing wiring behind hallway molding (the example in the Commission's rules of wiring that is not physically inaccessible).[138] In any event, we need only find that cutting through sheet rock significantly increases the physical difficulty **or** cost of accessing the wiring and, as described below, we find that the additional costs are typically significant.

b. The Cost of Accessing Wiring Behind Sheet Rock

41. We conclude that the cost of accessing wiring behind sheet rock is significant. The majority of commenters agree. IMCC submits two letters from private cable operators (PCOs) expressing their views. A letter from a PCO in Atlanta states that the work involved in accessing wiring at the demarcation point takes between two to four hours per unit and one hole cut would add $150.00 to

[131] NCTA Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 1.

[132] *Id.* at 2.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 4.

[136] *Id.*

[137] We disagree with NCTA that commenters are confusing accessing existing home run wiring with installing their own. Each of the commenters cited above refers to the difficulty of accessing existing wiring and states, in addition, that the installation of new wiring itself is a difficult and damaging process. Regardless, our analysis here is based on the comments only to the extent that they discuss the difficulty of accessing existing wiring.

[138] See note to 47 C.F.R. § 76.5(mmm).

$250.00 to the cost of wiring a unit.[139] The PCO further states that in a typical 200-unit building this work would cost approximately $40,000.00.[140] A Manager from a PCO in California asserts that accessing the home run wiring in an MDU 12 inches outside each residential unit is virtually impossible in most instances because that location would be 12 inches inside the neighboring MDU residence.[141] This PCO Manager asserts that this means it is then necessary to install a completely separate home run wire from the junction location to an access point within the residence at a cost of a minimum of $200.00 per unit.[142] RCN contends that the costs associated with accessing wiring behind sheet rock can range from $450.00 to $1,000.00 per unit, depending on the degree of difficulty that is encountered in efforts to locate, retrieve and connect the cable home run wiring to its own subscriber lines at the demarcation point and run it back to the junction box in the MDU.[143] Verizon asserts that the high costs to competing providers and consumers of accessing wiring behind sheet rock discourage competition.[144] Verizon asserts that restoration of sheet rock is the most labor-intensive and expensive part of the whole process because it requires multiple visits.[145] Verizon contends that time must be permitted for the repair work to set and dry before additional steps can be taken in the restoration process.[146] Verizon states that prices to restore the sheet rock to an acceptable condition may vary from $200.00 for an uncomplicated situation to $1,000.00 or more for high-end MDUs or in instances where larger sections of sheet rock must be repainted or wallpapered.[147] Verizon also notes that these costs reflect work on a single unit and that they multiply with additional units, although cost savings may be available when an entire MDU switches to an alternative provider.[148] Verizon also argues that most cable installers are not currently trained or qualified to perform the necessary repair and restoration work.[149] In that regard, Verizon contends that significant costs must be expended to train installers or to hire additional employees or contractors and these costs are passed on to cable subscribers and are likely to keep competing providers out of MDUs.[150]

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[139] IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 7 and Attached Letter from Bryan J. Rader, President/CEO, MediaWorks, to Bill Burhop, IMCC (October 27, 2004).

[140] *Id.*

[141] IMCC Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 7 and Attached Letter from Richard K. Baxter, Consolidated Smartsystems to Bill Burhop, IMCC (November 15, 2004).

[142] *Id.*

[143] RCN Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 7 and Attachment A (Affidavit of John Holbert, ISP Construction Manager for RCN-BecoCom, LLC at para. 13). In referring to an MDU that contained 209 units, RCN asserts that, at a minimum, it would cost $60,000.00 to accomplish the job. *Id.*

[144] Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 4. In referring to replacing wiring embedded in sheet rock, Verizon contends that the costs are high because all of the cutting and repairing of sheet rock must be done to the satisfaction of MDU owners and managers. *Id.* and Attached Declaration of P. Kelley Dune, Executive Director for Network Operations for Verizon Avenue at para. 6.

[145] *Ex Parte* Verizon filing at 5 (June 22, 2005).

[146] *Id.*

[147] *Id.* Verizon notes that this cost would be in addition to the roughly $50.00 required to locate the wiring and cut the initial hole in the wall for access. *Id.*

[148] *Id.*

[149] Verizon Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 4 and Attached Declaration of P. Kelley Dunne at para. 6.

[150] *Id.*

42. RAA & CAI state that they can offer no reliable cost information because this type of work is rarely done, but they maintain that, whatever the cost, it would be prohibitive.[151] RAA & CAI state that because property owner resistance and the practical challenges of doing the job right are so obvious that drywall installations are not given enough consideration by responsible management officials to warrant any serious cost analysis.[152]

43. NCTA counters by arguing that there are no significant costs involved in cutting and repairing sheet rock. NCTA resubmits a declaration already on the record from a Time Warner employee that states that cutting into sheet rock "is not difficult for an experienced MVPD provider to perform and is relatively inexpensive ($25.00)."[153] Another previously submitted declaration offered by NCTA from a Comcast employee referring to the "installation of cable television inside and home run wiring" states that the "[r]estoration of sheet rock subsequent to such installations is accomplished easily and inexpensively."[154] NCTA also submits more recent affidavits and declarations in support of its contention regarding the costs of accessing wiring behind sheet rock. One independent contractor asserts that after the demarcation point is accessed, repair of the hole can be accomplished "quickly and cheaply."[155] Another contractor asserts that accessing wiring behind sheet rock is a common procedure and "is not difficult for an experienced installer to perform, is relatively inexpensive and should have no adverse impact on the structural elements or the structural integrity of the building."[156] In addition, NCTA submits two affidavits that point out that accessing wiring behind sheet rock "is not significantly more difficult or expensive than accessing wiring that is behind molding."[157]

44. In reply, IMCC argues that NCTA's views are not reflective of what occurs in the real world of providing video services in MDUs. IMCC disputes NCTA's view that connecting to the wiring outside each unit can be accomplished easily and inexpensively. IMCC argues that NCTA ignores the process of finding the exact place in the ceiling or wall to make the connection; ignores the fact that the process usually requires using electrical taping at the connection; and, that service to each unit must be tested after the connection is made. IMCC argues that NCTA is wrong when it says that the process of accessing the wire only costs $25.00. According to IMCC, the estimates of $150.00-$250.00 presented in its comments by PCOs are more realistic numbers.[158] RCN replies that even if NCTA is correct with

[151] RAA & CAI Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 8.

[152] *Id.* at 8-9.

[153] NCTA Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 3 and Attachment B (Declaration of Al Costanzi, Time Warner Cable Vice-President, Engineering/Northeast Ohio at para. 6 filed with Opposition of Time Warner Cable – Oct. 22, 1998).

[154] *Id.* at 3-4 and Attachment B (Declaration of John Donahue, Vice President of Engineering for Comcast Cable Communications, Inc. at para. 4 filed with Comments of Comcast Communications, Inc. – Oct. 22, 1998). NCTA also submits two other previously submitted declarations in support. These declarations attest to the fact that drop pre-wiring at the time of new building construction and the *installation* of coaxial cable in pre-existing facilities, using such methods as *wall fishing*, do not disrupt the structural integrity or aesthetics of the building; however, they do not discuss the costs involved. *Id.* at 4 and Attachment B (Declarations of Christopher P. Patterson, Vice President of Suburban Cable and Jack Rockwell, System Engineer, Adelphia Communications at paras. 2-3).

[155] *Id.* at 4 and Attachment A (Declaration of John Chamberlain, President of JC Communications at para. 4).

[156] *Id.* at 5 and Attachment A (Declaration of Joseph Danno, Vice President of Midtown Express, Inc. at para. 6).

[157] *Id.* at 6 and Attachment A (Affidavits of John Kuhn, President and CEO for Prince Telecom, Inc. and William J. Kelly, Executive Vice President for General Fiber Communications at para. 6).

[158] IMCC Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 3.

its $25.00 cost estimate, this does not complete the analysis.[159] RCN argues that the fact is that placing the demarcation point behind sheet rock impedes competitors' access to cable inside wiring and, accordingly, deprives consumers of access to competitive MVPD services.[160]

45. In reply, NCTA argues that it is highly misleading that experienced installation technicians require additional training in order to access MDU wiring at demarcation points.[161] NCTA maintains that in the performance of their normal duties, installers routinely cut holes in sheet rock walls.[162] NCTA also argues that cutting and repairing sheet rock in order to access wiring almost never involves the disruption of adjacent units or units on other floors.[163] Moreover, NCTA states that installers commonly use inexpensive cable locator devices to pinpoint the location of wiring.[164] NCTA states that contrary to the calculations set forth by some commenting parties, the per-unit MDU cost where multiple units are accessed is much lower than the cost to cut and repair only a single unit.[165] NCTA specifically addresses IMCC's comments that contend that cutting and repairing sheet rock is a process that consumes two-to-four hours and involves between $150.00-$250.00 in labor costs.[166] NCTA argues that in a two-to-four hour scenario, much of the time would have to be attributed to downtime involving the drying of the patching and repairing material used.[167] According to NCTA, experienced technicians would not work on one unit at a time, sitting and waiting for the patching to dry before painting and moving on to the next unit.[168] NCTA argues these installers would "multi-task" and create an assembly line process which would greatly reduce the downtime and overall cost of the project.[169] NCTA further contends that because most of the expense of accessing wiring at demarcation points behind sheet rock is associated with the cost of the labor involved, this cost is about the same as it would cost to access wiring in hallway molding.[170] NCTA notes that the Commission's rules specifically provide that wiring at a demarcation point located behind molding is not physically inaccessible.[171] NCTA argues that it follows that if the costs and difficulty of accessing wiring at a point located behind sheet rock are comparable to the costs of accessing wiring behind molding, then wiring behind sheet rock is also not physically inaccessible.[172]

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[159] RCN Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 2.

[160] *Id.*

[161] NCTA Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 5 and Attached Declaration of Joseph Danno, Vice President of Midtown Express, Inc. at para. 4.

[162] *Id.*

[163] NCTA Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 7 and Danno Declaration at para. 10.

[164] *Id.* and Danno Declaration at para. 11.

[165] *Id* and Danno Declaration at para. 8.

[166] *Id.* at 8.

[167] *Id.* and Danno Declaration at para. 7.

[168] *Id.*

[169] *Id.*

[170] *Id.* and Danno Declaration at para. 8.

[171] *Id.* at 9.

[172] *Id.*

46. In analyzing the costs involved in accessing wiring behind sheet rock, we recognize that the record reveals a wide divergence among the estimates offered by commenters – ranging from $25.00 to $1,000.00 – as the appropriate sum needed to accomplish the job.[173] Although we find that we cannot pick a precise monetary figure that fairly reflects the costs associated with accessing cable inside wiring, we believe it is reasonable that costs estimates could include factors such as how difficult it may be to satisfy the MDU owner and manager with repair work and whether a single unit or many units are worked on in one time period. Taking these factors into consideration, we conclude that we should not rely on the lower costs estimates, such as the $25.00 estimate by NCTA, because they do not include some of these factors. We believe that the estimates that do take into account these factors, which range significantly above $25.00, are closer to reasonable cost estimates for accessing wiring behind sheet rock. For example, as Verizon and other commenters note, the cost of repairing sheet rock can often include repainting and re-wallpapering entire walls or ceilings. Although we do not have specific quotes for restoration work, it seems likely that repainting and/or re-wallpapering entire ceilings and walls can, at a minimum, run into the hundreds of dollars, particularly for more high-end MDUs that use more expensive surface finishes. These figures appear significant, especially when compared to the estimates we received for accessing wiring behind hallway molding.

47. We received little comment on the costs involved in accessing wiring behind removable wall molding. Verizon states that, at most, the cost of accessing wiring located behind molding would likely be a third of the costs of accessing wiring behind sheet rock.[174] Additionally, Verizon asserts that the costs of going behind molding would never approach the costs associated with repairing sheet rock in expensive, high-end MDUs.[175] Verizon explains the cost differential by asserting that accessing wiring behind molding requires no modification of a preexisting structural element, as would be the case with sheet rock, and does not require multiple trips to an MDU to make the kind of restorations involved with sheet rock.[176] Verizon describes the accessing of wiring behind molding as a simple process that generally only requires snapping molding off its retainer in order to access the embedded wiring and snapping it back on once work is completed.[177] NCTA contends, however, that the cost of accessing wiring behind sheet rock is about the same as accessing wiring behind molding.[178] We are persuaded that removing and replacing molding is generally less intrusive and less expensive than cutting into sheet rock, locating the wiring, and then repairing the wall or ceiling to the satisfaction of MDU owners and managers. While there may be cases in which the cost of accessing wiring behind sheet rock may be comparable to removable molding the record demonstrates that the cost for sheet rock generally will be higher, and often significantly so.

B. Incumbent LEC Inside Wire Subloops

48. We grant Cox's request as described below. The Commission's rules and precedent make clear that competitors have the right of direct access to an incumbent LEC's unbundled inside wire subloops at any "point of technically feasible access," and we clarify that the terminal block to a

[173] *See supra* paras. 39-40, and 42.

[174] *Id.* at 5-6.

[175] *Id.* at 6.

[176] *Id.*

[177] *Id.*

[178] NCTA Comments, CS Docket No. 95-184 and MM Docket No. 92-260 at 6 and NCTA Reply, CS Docket No. 95-184 and MM Docket No. 92-260 at 5.

multiunit premise is such a technically feasible access point. We find any decision that does not allow for such direct access to be contrary to the Commission's rules and policy of promoting telephone and broadband competition.[179] While the Commission provided for these rights to be enforced through the state section 252 process, we further clarify the applicability of Commission precedent precluding certain approaches like those adopted by the OCC.

1. Competitors Have the Right to Direct Access to Inside Wire Subloops at Any Point of Technically Feasible Access.

49. The text of the *Triennial Review Order* makes clear that competitors may directly access inside wire subloops at any technically feasible point.[180] In contrast, the OCC *Arbitrator's Report* stated that "direct access" to the terminal block "is not in the public interest." A state decision, such as this one, denying direct access is at odds with Commission precedent.

50. The notion of forcing access through an intermediate terminal is fundamentally inconsistent on its face with the right to direct access.[181] The governing rule gives competitors the right of access at "*any point*" where a technician can access wire or fiber.[182] This rule allows a requesting carrier to select the point of feasible access, and we conclude that a reading of the word "any" to narrow the number or definition of access points, or to shift this discretion to an incumbent LEC or a state commission, would be unfounded and incompatible with our rules. In the *Triennial Review Order*, the Commission made clear that it is the competitor's right to choose by emphasizing that "[c]ompetitive carriers are able to access these subloops at any technically feasible terminal point at or near the building *in any technically feasible* manner," and that the imposition of at least one form of indirect access – a collocation requirement – is impermissible.[183] Consequently, we reject any interpretation of the Commission's rules that would allow only indirect access to inside wire at technically feasible points.[184]

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[179] We reject Verizon's request that a grant of the Petition could only be accomplished through a Commission rulemaking. Letter from Dee May, Vice President – Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-338 at 6 (filed May. 17, 2007) (Verizon May 17 WC Docket No. 01-338 *Ex Parte*). We are not adopting new rules, but interpreting the Commission's existing rules and precedent.

[180] In the underlying Oklahoma proceeding, "direct access" was defined as follows: "Direct access means that Cox technicians enter SBC-OK terminals at MTEs, identify UNE Subloops that Cox seeks to use, disconnect those UNE Subloops from the SBC-OK network and connect them to the Cox network by cross-connect procedure." *Arbitrator's Report* at 45.

[181] In other contexts, the Commission has expressly barred intermediate arrangements or devices where it has required "direct access." *See, e.g.*, 47 C.F.R. § 51.323(k)(2) ("Incumbent LECs must permit collocating carriers to have direct access to their equipment. An incumbent LEC may not require competitors to use an intermediate interconnection arrangement in lieu of direct connection to the incumbent's network if technically feasible."); *Amendment of Part 90 of the Commission's Rules Concerning the Interconnection of Private Land Mobile Paging Systems with the Public Switched Telephone Network in the Radio Spectrum Below 900 MHz, Report and Order*, Report and Order, PR Docket No. 86-335, 2 FCC Rcd 2379 (1987) (indicating that removing the need for an intermediate person or device is equivalent to permitting direct access).

[182] 47 C.F.R. § 51.319(b)(2)(i) (emphasis added).

[183] *Triennial Review Order*, 18 FCC Rcd at 17191, para. 350 (emphasis in original). Although both Cox and SBC cite to the *Virginia Arbitration Order* to support their respective positions on direct access, that decision is a Bureau-level order resolving an interconnection arbitration, and deals with a fundamentally different architecture where the requesting carriers were seeking access to inside wiring at the NID. *See, e.g.*, Petition at 11; SBC Opposition, WC Docket No. 01-338 at 17. However, we recognize in that order, the Bureau did interpret Commission precedent as

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2. The Terminal Block of a Multiunit Premise Is a Point of Technically Feasible Access.

51. The language and intent of the rules that the Commission adopted in the *Triennial Review Order* make clear that a terminal block of a multiunit premise is a point of technically feasible access to inside wire subloops.[185] The Commission defined "point of technically feasible access" as "any point in the incumbent LEC's outside plant at or near a multiunit premises where a technician can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within to access the wiring in the multiunit premises. Such points include, but are not limited to, a pole or pedestal, the network interface device (NID),[186] the minimum point of entry (MPOE), the single point of interconnection, and the feeder/distribution interface."[187] The terminal block fits squarely under the rules defining a point of technically feasible access – there is no real dispute in the record that a technician is capable of accessing the wires in the multiunit premises at the terminal block.[188] In fact, as Cox explains, "most incumbent LECs permit a competitive LEC to disconnect the inside wire from the incumbent LEC terminal block and connect it to the competitive LEC interface without any interference by the incumbent LEC."[189] As one incumbent LEC states, "[c]learly, the Commission's *Triennial Review Order* requires that CLECs have physical access to an ILEC's NID or terminal block, and is intended to preempt excessive and unnecessary costs and burdens."[190] The approach we take here is also consistent with the Commission's broader goals of removing disincentives for facilities-based competitors to deploy their own loop infrastructure and providing competitors with the greatest flexibility in network design.[191]

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establishing that competitors should have direct access to all wire on the customer side of the NID. *See Virginia Arbitration Order,* 17 FCC Rcd at 27243, para. 421.

[184] Thus, we reject the arguments of commenters that, for example, "CLEC access [to inside wire] at an incumbent's terminal block may be technically feasible where CLECs have access to an intermediate access terminal at that terminal block, thus permitting 'direct access' at that point while adequately protecting network facilities." Verizon Reply, WC Docket No. 01-338 at 3 (citing BellSouth Comments at 7-15).

[185] Section 51.319(b)(2) defines subloops for access to multiunit premises wiring as "any portion of the loop that it is technically feasible to access at a terminal in the incumbent LEC's outside plant at or near a multiunit premises." 47 C.F.R. § 51.319(b)(2). The rule then defines inside wire to be "all loop plant owned or controlled by the incumbent LEC at a multiunit customer premises between the minimum point of entry as defined in § 68.105 of this chapter and the point of demarcation of the incumbent LEC's network as defined in § 68.3 of this chapter." 47 C.F.R. § 51.319(b)(2).

[186] A NID is defined "as any means of interconnection of customer premises wiring to the incumbent LEC's distribution plant, such as a cross-connect device used for that purpose." 47 C.F.R. § 51.319(c). Apart from a competitor's obligation to provide the NID functionality as part of an unbundled loop or subloop, an incumbent LEC must also provide nondiscriminatory access to the NID on an unbundled basis. 47 C.F.R. § 51.319(c).

[187] 47 C.F.R. § 51.319(b)(2)(i).

[188] *See* Petition at 8 (describing the "terminal block" at issue).

[189] *Id.* at 4.

[190] Qwest Comments, WC Docket No. 01-338 at 6.

[191] *E.g., Triennial Review Order*, 18 FCC Rcd at 17190, para. 348 ("For all requesting carriers, especially carriers constructing facilities-based networks, the ability to access subloops at, or near, the customer's premises in order to reach the infrastructure in those premises where they otherwise would not be able to take their loop the full way to the customer, is critical.").

3. Implementation of Access to Inside Wire Subloops

52. The alternative access arrangements adopted by the OCC, whereby either SBC or Cox would place or construct, own, and manage an intermediate cross-connect device, conflict with prior Commission determinations on the scope of reasonable access. In circumscribing the scope of reasonable access in the other contexts, the Commission prohibited "a lengthy and burdensome process at the customer premises to collocate a separate terminal facility in order to gain access to the inside wire subloop, or other inside wire used by the LEC to access customers in multiunit premises."[192] The Commission also prohibited "an incumbent LEC requirement to have its technician present and to impose an associated charge on the [requesting carrier] for such contact on the non-network side of the NID."[193] Incumbent LEC impositions of such requirements would be contrary to the competitive goals of the NID and inside wire unbundling rules and thus were precluded by the Commission. These limitations reflect Commission balancing of interests to ensure competitive access to inside wire, which the Commission found important because competitors may be able to construct and provision a local loop using their own facilities all the way to a customer premises, yet still remain unable to reach the end user in that premises.[194] As such, consistent with prior Commission findings in a similar context, we find that the alternatives adopted by the OCC requiring an intermediate cross-connect device are unreasonable access requirements and inconsistent with our inside wire subloop rules.

53. Further, in explaining how a competitor will access a subloop at a technically feasible location, the Commission expressly recognized that that the physical work necessary for competitive access does not need to be provided by the incumbent LEC, but rather may be performed by the requesting carrier itself: "Accessible terminals contain cables and their respective wire pairs that terminate on screw posts which enables a *competitor's technician* to cross-connect its terminal to the incumbent LEC's to access the incumbent LEC's loop from that point all the way to the end user customer."[195] Although we do not address the question of whether the terminal block is a NID under our rules,[196] we do find some support from the *Triennial Review Order*'s authorization of competitors to use

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[192] *Id.* at 17199, para. 358. This decision makes clear that no collocation requirement exists for subloops used to access the infrastructure in multiunit premises. Incumbent LECs are required to provide subloops for access to multiunit premises without collocation. *Id.* at 17192, para. 350.

[193] *Id.* at 17199, para. 358.

[194] *Id.* at 17193, para. 351.

[195] *Id.* at 17184-84, para. 343 n.1013 (emphasis added). In light of the Commission's explicit identification of the rights of the technician of a competitor to perform the cross-connect, we are not persuaded by the assertion that the Commission meant to limit its intent to indicate technical details rather than substantive obligations. *See, e.g.*, SBC Opposition, WC Docket No. 01-338 at 14 (claiming that it is more reasonable to interpret this sentence "as merely describing the characteristics of accessible terminals, rather than establishing a national right on the part of competitive LECs to unfettered access to such terminals.").

[196] Under Oklahoma law, NIDs at multiunit premises are "always defined to be inside, at the first jack within the individual tenant customer premises." SBC Opposition, WC Docket No. 01-338 at 18. We agree with SBC that access to terminal blocks for the purposes of gaining unbundled access to incumbent LEC subloops is distinct from the issue of direct access to NIDs as separate UNEs. *Id.* at 16. The Commission clearly indicated in the *Triennial Review Order* that competitors have the right to direct access to the NID. *Triennial Review Order*, 18 FCC Rcd at 17199, para. 358. We therefore do not reach Cox's request that the Commission also clarify state law classifications regarding the locations of the points of demarcation and NIDs. *See* Petition at 12-15.

their own technicians to access the NID.[197] All three options adopted by the OCC would require Cox to use SBC technicians, and thus are also at odds with our holdings in the *Triennial Review Order*.

54. We conclude, however, that *factors* such as network security may be considered in section 252 proceedings, subject to the constraints enumerated by the Commission. Several commenters point to the OCC's reliance on network integrity concerns and ask that we defer to state-specific analysis of technical feasibility to prevent potential network damage and degradation.[198] However, the OCC did not undertake an analysis of technical feasibility under our regulations, and we emphasize today that any issue of network security must be addressed within the two-step framework of those regulations. Specifically, where there is a dispute as to whether it is technically feasible to unbundle at a given point in the network, under our rules the incumbent LEC then has the burden of demonstrating insufficient availability of space or technical infeasibility to a state commission.[199] Under the Commission's "best practices" rule, since at least one other state has determined that multiunit premises terminal block unbundling is technically feasible, an incumbent LEC has this evidentiary burden for terminal blocks in all other state proceedings.[200] We expect that states, acting pursuant to section 252 of the Act, will continue to consider interconnection, access, and pricing issues, especially those affecting the safety or integrity of consumer services, but emphasize that states must do so consistent with the Commission's framework and directions.[201]

55. The record before us indicates that in many instances incumbent LECs willingly allow direct access to terminal blocks pursuant to different arrangements,[202] and we do not mandate unconditional

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[197] *Triennial Review Order*, 18 FCC Rcd at 17199, para. 358 ("a competitive LEC seeking to make contact with the incumbent LEC's NID . . . so that the competitive LEC can reconnect such customer wiring to its own NID is not accessing the incumbent LEC's NID as a UNE").

[198] *See, e.g.*, SBC Opposition, WC Docket No. 01-338 at 12 (contending that "Cox's technicians caused pervasive damage to SBC-Oklahoma's network, including damage to 7,100 of SBC-Oklahoma's terminals, caused more than 3,000 recorded instances of trouble on SBC Oklahoma's network and over 9,000 hours of service outages to SBC Oklahoma's customers"); Verizon May 17 WC Docket No. 01-338 *Ex Parte* Letter at 3 (stating that the OCC resolved the dispute between SBC and Cox in a section 252 arbitration based on extensive record evidence.)

[199] 47 C.F.R. § 51.319(b)(3)(i).

[200] 47 C.F.R. § 51.319(b)(3)(ii). *See* Letter from Thomas W. Snyder, Corporate Counsel – Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-338 (filed May 29, 2007) (Qwest May 29 WC Docket No. 01-338 *Ex Parte* Letter); Letter from Jay Bennett, Executive Director – Federal Regulatory, AT&T Services Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-338 (filed May 25, 2007) (SBC May 25 WC Docket No. 01-338 *Ex Parte*). Thus, contrary to Verizon's concern, we are not overriding the rules governing state determinations regarding technically feasible access to subloops, but are ensuring that the states rely upon these rules and our precedent regarding technical feasibility. Verizon May 17 WC Docket No. 01-338 *Ex Parte* at 4.

[201] 47 C.F.R. § 51.319(b)(3)(i). The record indicates a controversy regarding the responsibility for prior damage to SBC's terminals, and the declaration we make here has no bearing on the resolution of that dispute, or on any incumbent LEC's rights to seek damages against any party for past or ongoing damage to its network and for compensation for the work it performs. *Arbitrator's Order* at 45 (finding that direct access "may seriously jeopardize [SBC's] ability to maintain network integrity, security and control, as well as accountability for damage and substandard engineering an operational practices); SBC Opposition, WC Docket No. 01-338 at 11; SBC Reply, WC Docket No. 01-338 at 4.

[202] For example, Qwest indicates that "it is not necessary for an ILEC to perform all of the connections and rerouting of inside wire subloop themselves, and that Qwest has no objection to CLECs using their own personnel." Qwest Comments, WC Docket No. 01-338 at 11. Qwest adds that state regulators in all fourteen of the states in Qwest's incumbent LEC territory require notification when a requesting carrier accesses the incumbent LEC's inside wire (continued....